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**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**OCTOBER TERM, 1996**

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ELEANOR TAYLOR,
Plaintiff-Petitioner
VS.

McLENNAN COMMUNITY COLLEGE,
DR. DENNIS MICHAELIS,
DR. DEBORAH GARRETT,
MR. RICHARD CORONADO,
MR. MIKE JONES,
Defendants-Respondents

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

(95-50601)

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner's summary judgment evidence was sufficient to raise fact issues on the following claims:

   A. Retaliation for exercising First Amendment right of free speech

   B. Retaliation for opposing discriminatory practices as protected by Title VII

   C. Deprivation of procedural due process

2. Questions that are essential to the determination of the ultimate legal issue cited above are:

   A. Whether Petitioner's refusal to enforce or support an employment practice/action that gave preference to one race to the detriment of other races constitutes "opposition" protected by Title VII and/or "speech" protected by the First Amendment.

   B. Whether an employment practice/action that gives preference to one race to the detriment of other races is a matter of "public concern" sufficient to invoke Petitioner's First Amendment rights if Petitioner is a member of one of the races detrimentally affected.

   C. Whether an employer's decision to implement/enforce an employment practice/decision that gives preference to one race to the detriment of other races constituted an "interest in efficient management" that outweighed Petitioner's First Amendment free speech right.

D. Whether Petitioner's refusal to implement or enforce an employment practice/decision that gave preference to one race to the detriment of other races is a "legitimate non-discriminatory" reason for termination of employment under Title VII.

3. Whether Petition was afforded procedural due process when her employment was terminated.

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## CITATIONS FOR REPORTS OF LOWER COURT DECISIONS IN THIS CASE

United States District Court, Western Division of Texas, Waco Division: not yet reported

United States Court of Appeals for the Fifth Circuit: not yet reported

## STATEMENT OF JURISDICTION

### Course of Proceedings

The United States Court of Appeals for the Fifth Circuit entered its judgment on the 26th of June, 1996. (A copy of the Fifth Circuit Judgment and Opinion is filed with this Petition in a separate volume designated as an "Appendix" to the Petition.)

A Petition for Rehearing was timely filed and was overruled on the 13th of August, 1996.

### Supreme Court Jurisdiction

Jurisdiction is vested in the Supreme Court pursuant to 28 U.S.C. § 1254(1), this being a petition for review of a judgment entered by the United States Court of Appeals for the Fifth Circuit on appeal from a summary judgment entered by the United States District Court for the Western District of Texas, Waco Division. (A copy of the District Court's Order is filed with this Petition in a separate volume designated as an "Appendix" to the Petition.)

This Petition is filed for two purposes: (1) to secure uniformity of decisions between Circuit Courts of Appeals and (2) to bring up a question of importance that

significantly affected this case and which is of grave public interest in the area of employment and civil rights as follows:

(1) The record in this case established that the major reason for Taylor's discharge was her alleged "refusal" to implement the Defendants' employment policies/decisions which required her to diversify her staff by recruiting Hispanic staff (District Court Opinion, p. 32-34, R. 1494-1496, adopted by the Fifth Circuit, Judgment and Order, p. 2.) The District Court (and the Fifth Circuit, by adopting the District Court's opinion) found that Taylor's "refusal" to implement the policies was not the equivalent of speaking out against discriminatory practices of public concern (D.C.Op., p. 26-27, R. 1488-1489), that Taylor's "refusal" essentially constituted insubordinate behavior, and that Taylor's discharge for such "insubordinate" behavior could not support her claims for retaliatory discharge under Title VII (i.e., "opposition") and/or under the First Amendment (D.C.Op. p. 32-34, R. 1494-1496; and p. 44-46, R. 1506-1508). The Court's decision in this case conflicts with the decision of the Ninth Circuit in Moyo v. Gomez, 40 F.3d 982, (9th Cir. 1994) cert. denied 115 S.Ct. 732, wherein the Court held that "Opposition can, of course, consist of a refusal to carry out an order or policy." (emphasis added, at 984); and

(2) Almost twenty years ago, in considering medical school admission standards, this Court explained that government action "preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake", forbidden by the Constitution. Regents of

University of California v. Bakke, 438 U.S. 265, 307 (1978). On July 1, 1996 (only one week after this case was decided by the Fifth Circuit on June 26, 1996), this Court denied certiorari (116 S.Ct. 2580) in the case of Hopwood v. State of Texas, et al, 78 F.3d 932 (1996), wherein a panel of the Fifth Circuit declared the University of Texas Law School admissions policy unconstitutional because the policy "elevate[d] some races over others", and declared that the policy was unconstitutional even though it was adopted "for the wholesome purpose of correcting perceived racial imbalance in the student body" (Id., at 934). In the instant case, the Defendants charged Taylor with "failure or refusal to diversify her staff" as required by the College's Affirmative Action Plan, and decided that Taylor would not be allowed to employ qualified black and white employees that had served as her faculty in the past unless and until she employed an hispanic in a faculty position. Later the College declared that all faculty positions were vacant and the College re-advertised for new applications. Taylor opposed the College's decisions and/or the alleged "policy" as it was enforced by Defendants. She was reprimanded for her "failure or refusal to diversify her staff", and the "failure to diversify her staff" was the only factual basis cited for the termination of Taylor's employment in the summary judgment affidavit of the College President, Michaelis, who was the final decision-maker with respect to the termination. Even though the District Court (and, by adoption, the Fifth Circuit) assumed "arguendo that Plaintiff was told she could not hire any Blacks or Whites until she hired an Hispanic" (at p. 26, R. 1488), the Court disregarded the fact that the College's employment decision/order constituted discrimination per se, i.e. was a decision/order made

solely on the basis of race, and held that "MCC's interest in efficient management of its operations clearly outweigh[ed] Taylor's interest in commenting on MCC's request for her to diversify her staff (p. 26, R. 1488). Furthermore, despite Taylor's summary judgment testimony that she was told by the College that she could not hire any Blacks or Whites until she hired an Hispanic, the District Court (and, by adoption, the Fifth Circuit) held that Taylor did not provide any "direct" evidence of discrimination and that she "must prove her claims of disparate treatment and/or retaliatory discharge inferentially" (D.C.Op. p. 42, R.1504). The Defendants admitted that one of their justifications for Taylor's discharge was her refusal to "diversify her staff"; therefore, if Defendants' policy of "diversification" was per se discrimination in that the policy gave preference to one race to the detriment of other races, then there is clearly "*direct*" evidence of unlawful retaliation against Taylor for opposing discriminatory practices and Defendants summary judgment on Taylor's retaliation claims should have been denied. Per se racial discrimination in the employment setting significantly impacts individual opportunity and violates the principle of racial equality; and it is gravely important that this Court affirm that per se racial discrimination in an employment setting solely for the purpose of "diversity" is just as unconstitutional as per se discrimination in other situations (e.g., school admission). Further, it is gravely important that this Court affirm that an employment practice that constitutes per se discrimination is of sufficient public concern that opposition to such a practice invokes both First Amendment and Title VII protections, regardless of the fact that the person opposing the practice may be

a member of the class adversely affected by the practice.

## STATEMENT OF MATERIAL FACTS

Petitioner Taylor was hired by Respondent McLennan Community College ("College") as a Counselor for the Special Services program in September of 1980. In 1985, Taylor submitted a grant proposal to the U. S. Department of Education to establish an Upward Bound program at the College. The grant was awarded in 1986, and Taylor became the Coordinator for the new Upward Bound program. Taylor continued to work in that position until February 11, 1993, when she was notified that her employment was terminated effective March 31, 1993. The authority to terminate Taylor's employment was vested in Dr. Dennis Michaelis, President of the College. Michaelis' termination letter stated that Taylor's employment was being terminated because of her "failure to adhere to College policies and directions" and "acts of insubordination" (R.512), but no specific factual bases for these conclusions were stated in the letter. Dr. Michaelis' summary judgment affidavit stated that he believed "that Mrs. Taylor did an overall good job with Upward Bound and that it is very unfortunate that she so strongly resisted the direction of her superiors" (R.425); the only factual example of Michaelis allegation of Taylor's "resistance to direction" was her alleged "refusal or inability to diversify the staff of Upward Bound" (R.424). Respondent Jones had been promoted to become Taylor's immediate supervisor in April of 1992 and continued in that position until he was demoted after Taylor's discharge. Jones recommended Taylor's discharge in a letter dated February 2, 1993, which stated that Taylor "consistently disobeyed orders in following EEO hiring guidelines" (R.548). Jones testified in deposition that this statement specifically

referred to issues relating to the hiring of instructors for the summer of 1992 (R.1092). Respondents contended in the district court and on appeal that "one of the administration's major concerns with Upward Bound was Taylor's refusal or inability to attract Hispanic employees" (Appellee's Brief, Fifth Circuit, p. 6).

The Upward Bound program was staffed with part-time teaching faculty who were employed to teach the students during the regular academic year (i.e., Fall and Spring semesters) and for a six-week summer session. The procedure for hiring these teachers was set forth in the Upward Bound grant renewal application for the 1989-90, 90-91, and 91-92 academic years (R.1290). The grant proposal was approved and signed by Michaelis and provided that "teachers" and other "part-time staff" were to be recruited through community contacts "by the Program Director"..."at the beginning of the program as well as for vacancies" (R.1290). The grant also contemplated that part-time faculty would be continued in their employment from year to year, depending on satisfactory performance. Specifically, the grant stated that "A one-on-one evaluation will be conducted by the Director...at the end of each component for part-time staff to evaluate job performance and to recommend continuance or non-continuance with the program" (R.1293).

In October of 1990, Michaelis sent a letter to Taylor's supervisor, Dr. LaVerne Wong, expressing concern that there was "NO Hispanic representation on the Upward bound staffing" and concluding that "we must make every attempt in the future to see that broader ethnic representation be accomplished" (R.510). When Dr. Wong mentioned this communique to Taylor, Taylor wrote a grant request for supplemental funding for a new full-time position for an Upward Bound bilingual counselor (a/k/a

"academic coordinator" per supplemental grant proposal), which was designed to benefit Hispanic students and predicted to attract qualified Hispanic applicants for full-time employment. The supplemental grant request was approved and funded by the Department of Education in 1991, but the bilingual counselor's position was not filled until 1993 the Defendant College did not provide space for the additional staff person and did not authorize filling the position until after Taylor was discharged (R.1201, 1299-1327). The College was well aware of the fact that this position was fully funded but was still vacant in April of 1992 because the position was clearly shown as a "vacant" position in the Upward Bound program on an organizational chart dated April 9, 1992 and forwarded to Michaelis by Garrett when the Student Services Division was reorganized and Jones became Taylor's immediate supervisor (R.1226). Also Garrett and Jones admitted that they knew about the availability of the position (R.645-646; R.1124-1126,1129).

In May of 1991, Taylor recommended continued employment of part-time faculty for summer school and in September of 1991, Taylor recommended employment of part-time faculty for the 1991-92 regular academic year. Both sets of recommendations were approved by her immediate supervisors, Wong and Garrett (who succeeded Wong when she retired in August of 1991). Both sets of recommendations were also approved by Respondent Coronado, the college's Personnel Director and EEO Officer, without question or comment (R.1213).

In the Spring of 1991, Taylor was called to testify in an OCR investigation into a charge of racial discrimination by the College; the charge had been filed by a Black Female. Taylor was called as a witness because she had been denied an opportunity to apply for a promotion to a

supervisory position that had been created in her division in late 1990 or 1991. The position had not been advertised for competitive application and a white female had been selected to fill the position. (R. 756-762) Taylor did not learn that the OCR report had been completed until the spring of 1992; and in early May of 1992, Taylor requested that Coronado furnish her a copy of the OCR investigative report (R. 827-828).

Also in May of 1992 (shortly after Taylor requested a copy of the OCR report), Taylor submitted her recommendations for employment part-time Upward Bound faculty for the summer program. All persons that Taylor recommended had previously been employed as part-time faculty in the Upward Bound program and were entitled to be continued in their employment under the terms of the Upward Bound grant document, cited above, so long as they received satisfactory performance evaluations. The employment histories of the recommended faculty at the college was: Doris Londonberg, employed since 1988 (R.1229); Alex Carter, employed since October of 1990 (R.1241); Wendell Hudson, employed since 1991 (R. 1242); Wayne Watlington, employed since 1988 (R.1245); and Henry Jennings, employed since September of 1990 (R.1252). Taylor's recommendations were approved by Jones and Garrett, but were totally rejected by Coronado (R. 903-908). On May 29, 1992, Coronado and Jones told Taylor that her recommendations would not be approved because (1) she had not advertised the positions and (2) she had not recommended an "Hispanic" for employment (R.1213). Taylor had never before been told that she had to "advertise" part-time positions and the College had no written policy requiring that any part-time positions be advertised until September, 1992 (R.1213, 1262). Nonetheless, the College steadfastly refused to continue the employment of the entire summer teaching faculty--white

and black--unless and until an Hispanic was hired (R. 1119-1124; 1440).

On June 24, 1992, Taylor was formally reprimanded for not having employed "Hispanics" and Jones stated that "this criteria must be met before I will make any employment recommendations for the Upward Bound Program" (1440, emphasis added). Jones testified that this edict came from the "president of the college" (R.1092-1095; 1119-1124). The June 24th reprimand clearly stated that the failure to comply with directives would result in termination of Taylor's employment (R.533). The summary judgment record contains no written reprimands issued to Taylor prior to June 24, 1992, and Taylor's last performance evaluation prior to her discharge and delivered in 1991, had been an excellent evaluation (R.1210,1374-1382).

On July 2, 1992, Taylor delivered a detailed response to Jones' June 24th reprimand (R.1442-1454) and furnished Jones copies of her response for delivery to Garrett, Coronado, and Michaelis (R.1454). In her response, Taylor did clearly state her objection to the College's refusal to continue the employment of Upward Bound faculty during the summer unless and until an Hispanic was hired. Taylor also clearly stated that her opposition to the college's decision was based on the fact that the College's action discriminated against the white and black employees who were qualified and who merited continued employment. Specifically, Taylor stated:

> You have indicated to me that the refusal to hire the part-time staff recommended for the summer program was based on the policy of the college not to discriminate in its employment practices. Yet it appears to me that the course of action taken has resulted in rather than avoided discrimination since

> **all blacks and all whites who were qualified to be employed in this program have been denied employment because the college refused to hire these qualified employees unless a Hispanic was hired first.** (R.1453, emphasis added)

Most of the employees who had been recommended for employment worked with the Upward Bound students, without pay, during the summer because they were concerned about the students who would otherwise be deprived of the educational benefits of the program. The employees requested to meet with Jones and expressed their concern about providing continuity of instruction for the students; however, Jones disregarded the faculty's concerns because, as far as he was concerned, "following directives and insubordination were bigger issues" than the students' needs (R.1118).

On July 14, 1992, Jones issued another written reprimand to Taylor (R.542). This reprimand was also related to the College's decision not to continue Upward Bound faculty as employees during the summer session. Jones chastised Taylor for not obtaining statements from the faculty, acknowledging that they were working with the students as "volunteers" and would not be paid. In his July 14th reprimand, Jones stated that Taylor's actions during the summer of 1992 had placed her employment "in jeopardy" and also stated that if Taylor continued to "violate policies", Jones would have "no choice but to recommend...termination of employment" (R.542). Taylor also furnished a detailed response to Jones' July 14th reprimand (R.543-545).

On August 10, 1992, Jones issued another reprimand to Taylor and reminded her that if she did not work with him and the Personnel office in "diversifying" her staff, her

employment recommendations would not be approved and the Upward Bound program would not begin in the Fall of 1992. He again emphasized that the "failure to follow the directives in this memorandum are grounds for and will result in termination of...employment" (R.547-548).

The Upward Bound faculty that were qualified for the Upward Bound teaching positions and who had been employed in the program before May of 1992 were required to re-apply for positions in the program in the Fall of 1992. The College advertised all part-time Upward Bound faculty positions. No qualified Hispanic applied, was interviewed, or hired; in the process, however, the Upward Bound education program was again shut down from September 1st to November 15, 1992 because of the College's delay in hiring personnel (R.1136-1139; 1148-1149).

No reprimands were issued to Taylor between August 10, 1992 and February 11, 1993, when she received the President's termination letter (R.989, 1183). Jones' letter recommending Taylor's discharge (which was never furnished to Taylor until after this lawsuit was filed) did not contain any specific dates or identify specific events that occurred after August of 1992 and precipitated his recommendation; and Jones could not identify any specific examples of alleged misconduct or insubordination that occurred between August of 1992 and February of 1993, except an incident involving exposure to toxic fumes in the workplace, which incident formed the basis of a worker's compensation claim filed by Taylor (and her staff) against the College (R.1183-1186).

Dr. Michaelis was the official who ultimately made the decision to terminate Taylor's employment. The only factual basis for Taylor's discharge that was described by Michaelis in his summary judgment affidavit was Taylor's

"refusal or inability to diversify the staff of Upward Bound" (R. 424).

## ARGUMENT

### Standard of Review

A court's grant of a summary judgment is to be reviewed de novo. Summary judgment is appropriate only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears an "exacting burden of demonstrating that there is no actual dispute as to any material fact in the case." Impossible Electronics Techniques, Inc. v. Wackenhut Protective Systems, Inc. 669 F.2d 1026, 1031 (5th Cir. 1982). In determining whether summary judgment was proper, the Court must view the evidence presented and all factual inferences from the evidence in the light most favorable to the party opposing summary judgment; and all reasonable doubts as the existence of a genuine issue of material fact must be resolved against the movant. Moore v. Eli Lilly Co., 990 F.2d 812, 815 (5th Cir. 1992), cert Denied, 114 S.Ct. 467, 126 L.Ed.2d 419 (1993).

1. "Refusal" to carry out an order or policy. In the instant case, the District Court, and the Fifth Circuit, by adopting the District Court's findings and conclusions, essentially held that the mere refusal to carry out an order was not sufficient to constitute "opposition" to the alleged discriminatory practices.[1] More importantly, this case

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[1]Actually the District Court (and the Fifth Circuit, by adoption) erroneously found that Taylor did not verbally protest the discriminatory practices at the time that they occurred (D.C.Op. p. 26-27, R. 1488-1489). The summary judgment record

stands for the proposition that "refusal" to comply with an employer's order, even if the order is unconstitutional discrimination, is "insubordination" that justifies termination. This holding is diametrically opposed to the holding in the case of Moyo v Gomez, 40 F.3d 982, 984 (9th Cir. 1994), cert. denied 115 S.CT. 732 (1995). The disparity between the holding in this case and in the Moyo case is particularly significant since the Defendants themselves cited Taylor's refusal to comply with the directives to "diversify" her staff was a major "concern" (Michaelis Aff., R. 424) that precipitated the termination of her employment. Thus, if her "refusal" was protected activity and if it caused her termination, her retaliation claim is established--at least for purposes of a summary judgment--unless Defendants can establish that she would have been discharged regardless of her protected activity.

2. Discrimination per se. The most glaring error in the holdings of the courts below is the total lack of recognition that an Affirmative Action Plan can indeed constitute discrimination per se, if it prefers one race over another without justification by a compelling state interest. The error of the courts is best exemplified in the following excerpt from the District Court's opinion:

> "Plaintiff seeks to turn the College's alleged desire to have her program more accurately reflect the racial

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below included Taylor's affidavit and exhibits attached thereto and incorporated by reference therein. One of the exhibits was Taylor's memo of July 2, 1992 delivered to all four individual defendants, wherein she expressly stated that "...the course of action taken has **resulted in rather than avoided discrimination since all blacks and all whites who were qualified to be employed in this program have been denied employment because the college refused to hire these qualified employees unless a Hispanic was hired first.**
(R. 1453, emphasis added)

composition of her students into a claim of racial discrimination. However, MCC's summary judgment evidence indicates that the purpose was to follow EEOC guidelines and to have the staff members of MCC reflect the composition of the students. This fact is especially important in programs like Upward Bound where the purpose is to encourage students from disadvantaged backgrounds to stay in school and to realize that they can achieve success through education. By having someone of a like race serve as an instructor, the goals of the program are furthered because he serves as a role model that 'someone like me' can succeed." (D.C.Op. p. 32, R. 1494)

Defendants offered no expert testimony that this principle was even valid; instead, the principle was stated as a belief or conclusion on which their decisions were based.

On March 18, 1996, the Fifth Circuit Court of Appeals issued an opinion in Hopwood v. State of Texas, et al, 78 F.3d 932 (1996). The Supreme Court denied the petition for writ of certiorari in the Hopwood case on July 1, 1996, four days after the Fifth Circuit rendered its opinion in the instant case. Thurgood Marshall Legal, Etc. v. Hopwood, et al, cert. denied, 116 S.Ct. 2580. Although this case involves race discrimination in employment, as opposed to law school admission, the principles and law governing the decision in Hopwood are equally applicable to the case at bar. The damage accruing from the type of discriminatory action that occurred in this case is certainly as significant as the impact of the discriminatory practice at issue in Hopwood. In Hopwood, students were denied admission to law school based on differential standards adopted to favor minorities that were underrepresented in the student population of the school. In the instant case, the College had already admitted qualified faculty into the

workforce of the Upward Bound program; and, under the terms of the grant awarded by the United States Department of Education, all of the faculty were eligible to be continued in the employment of the College if their performance was satisfactory. Despite the fact that Taylor had evaluated and recommended the faculty for continued employment, the College decided that all of the faculty would be denied continued employment during the summer terms of 1992, and that the faculty positions previously filled by qualified Black and White faculty would be declared vacant and the former employees would be forced to reapply because one race (Hispanic) was not represented in the faculty as it had previously been constituted. The college's actions in this case would be completely analogous to Hopwood if Hopwood had been granted admission into the U. T. Law School but had later been dismissed and forced to reapply because minorities were underrepresented in her class. The discriminatory conduct in this case is even more outrageous when one considers that the college did not advertise and recruit Hispanics to fill the full-time vacant bilingual counselor's position in Upward Bound before taking the extreme action of disenfranchising the existing part-time faculty merely because no Hispanic had been recommended for a part-time position.

The college in this case, like the law school in Hopwood, offered no justification for its action denying continued employment to the Upward Bound faculty other than to claim that the conduct was justified by the "perceived racial imbalance" (Hopwood, p.1.) in the Upward Bound workforce and by the fact that Taylor was supposedly told to correct the imbalance but failed to do so. Neither of these excuses is sufficient to meet the strict scrutiny test of Hopwood if the conduct of the College did indeed have the effect of elevating some races over others. Ibid, p. 1, 6. The college, like the law school in Hopwood, also attempted

to justify its action by claiming that its "Affirmative Action Plan" was imposed on the college by its contract with the U.S. Department of Education. This argument also does pass muster since the implementation of the affirmative action plan would be controlled by the college and would still have to meet the requirements of strict scrutiny under Hopwood. Ibid, p.19.

Petitioner clearly pointed out to the District Court and to the Fifth Circuit that she voiced her opposition to the college's discriminatory employment action in the summer of 1992. Taylor's summary judgment affidavit attached as a exhibit and incorporated by reference her July 2nd Memo, that had been distributed to Jones, Garrett, Coronado, and Michaelis. The memo recited in great detail Taylor's discussions with Coronado and Jones when the decision to reject her employment recommendations was first communicated to her in late May of 1992, shortly before the Upward Bound students were due to arrive on campus for the summer program; and also stated that the decision of the college had discriminated against the qualified balck and white employees that had been recommended for continued employment. (The relevant text of the Memo is quoted on p. 15-16 of the Statement of Material Facts above.)

In summary, the principles articulated in Hopwood compel this Court to hold that the College's employment action in the summer and fall of 1992 was race discrimination per se and was unconstitutional absent some very compelling interest.

3. Protected Speech. If the College's action was discrimination per se, then the question of whether Taylor's opposition addressed a matter of "public" concern must be answered in Taylor's favor. Race discrimination by a public

entity or public official is a matter of "inherently great public concern." Wilson v. UT Health Center, 973 F.2d 1263, 1269 (5th Cir. 1992).

The summary judgment record in this case does not support the District Court's judgment or the Fifth Circuit's opinion that Taylor's speech was not of public concern and was not intended to protect the public interest of discrimination-free work places (Panel Decision, Subparagraph 3). In 1990, Taylor complained about a racial epithet in an assigned textbook, acting at the behest of students (R.1192). In 1991, she testified in response to an Office of Civil Rights investigation about a college employment practice that affected her (R.1192) and about employment practices that had affected others (R.1212,1209). In 1992, when Taylor objected to the college's decision to "stop" the Upward Bound program and not to continue employment of the part-time faculty until a Hispanic was hired, her complaints were made on behalf of Upward Bound staff and students. Although Taylor's complaints did include one matter that affected her directly (1991) and another that affected her indirectly (1992), Taylor's speech can and does rise to the level of a predominantly "public" concern, rather than speech of a purely personal nature. Wilson v. UT Health Center, cited supra, 1268-1270 and in Davis v. Ector County, Texas, 40 F.3rd 777 (5th Cir. 1994). "A topic otherwise of public concern ...[does not]...*lose* its importance merely because it arises in an employee dispute." Hall v. Ford, 856 F.2d 255, 260 (D.C.Cir. 1988); see also Wulf v. City of Wichita, 883 F.2d 842, 860 n.26 (10th Cir. 1989); Rode v. Dellarciprete, 845 F.2d 1195, 1201-1202 (3rd Cir. 1988). The content of the disputed speech rather than the motive behind its utterance is the "greatest single factor" in the analysis. Belk v. Town of Minocqua, 858 F.2d 1258, 1264 (7th Cir. 1988),

cert. denied, 489 U.S. 1053, 109 S.Ct. 1314, 103 L.Ed.2d 583 (1989).

In Wilson, cited supra, a sergeant in the UTHC police force claimed she was demoted and discharged in retaliation for reporting sexual harassment. Her reports had been made within the UTHC police force. The trial court dismissed her claim, finding that her speech was not of public concern but was of personal concern to herself as a victim of alleged sexual harassment. The Fifth Circuit reversed, holding that sexual harassment "like race discrimination" is a matter of "inherently great public concern". Wilson, at 1269. The Court also noted that the fact that the speech is delivered in a private forum (within the employment setting) does not detract from the fact that the issue addressed is of "public" concern, when the concern is expressed both as a citizen and as an employee. Wilson, 1270. The dual role of the speaker was also been cited in Davis, wherein this Court held that the speech was of public concern even if the speaker's motive was to strengthen the credibility of a sexual harassment claim that had been filed by his wife and was pending adjudication. As in Wilson and Davis, Taylor's speech focused on an issue of inherently great public concern and her expressions, as a whole, should be protected, despite the fact that she was a minority and despite the fact that she had once complained about a discriminatory practice that had directly impacted her.

4. Employer's interest in efficient management. Again, if the principles stated in Hopwood are applicable to this case and the College's decision not to continue the employment of qualified faculty was racial discrimination per se, the facts in this case cannot support the District Court's judgment or the Fifth Circuit's decision that the college's interest in efficient management of its operations "clearly outweigh Taylor's interest in commenting on MCC's

*request for her to diversify her staff.*" (emphasis added, District Court's Opinion, R. 1488). There is no evidence that Taylor caused any disruption. She voiced her opposition to the College's discriminatory action by her actions and by her express notice to the administration that she considered the decision to discontinue the employment of qualified faculty to be discrimination. She and her rejected faculty did actively resist the decision of the administration when they continued to operate the summer program for the students even though the faculty was not approved and was not being payed for their services. Essentially Taylor tried to do her job by delivering much-needed educational services to an economically disadvantaged student population. Also, Taylor's opposition was directed primarily through the chain of command.[2] If disruption occurred, it was because the college's action of trying to shut down the Upward Bound program was abrupt and totally unreasonable, causing confusion and chaos among the staff, the students, the parents and the public at large. The faculty is the most important element of an educational program and the decision to discontinue the employment of faculty was the decision of the college--not Taylor. The college should have been able to predict the disruption that would be caused by such an impulsive move. In summary, it is difficult--to say the least--to comprehend how the total elimination of faculty positions for a summer session and part of a fall session can promote the "efficient management of operations" of an educational program. It is also difficult to comprehend how the College's stated objective--i.e., to diversify the staff--compelled the sudden and drastic action of discontinuing the services of a program pending

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[2]The fact that Taylor primarily relied on opposition directed through the chain of command was erroneously cited as support for the Disctrict Court's conclusion that her opposition did not relate to a matter of "public concern" (D.C.Op. p.27, R.1489)

recruitment and hiring of an Hispanic part-time faculty member.

5. Causation. Petitioner's summary judgment evidence was also sufficient to raise a fact issue regarding whether or not Taylor's employment was terminated because of her opposition to discriminatory practices. Respondents have all but admitted that Taylor was terminated because she did not follow her superiors' directives to stop delivering an education to the Upward Bound students until an Hispanic was hired,--euphemistically "diversify" her staff. In other words, Taylor did not agree with the directives of her supervisors insofar as the directives required that all faculty positions be declared vacant solely because there was not an Hispanic working in the program; and she both resisted the College's action and stated her opposition. The record contains no written reprimand of Taylor, from the inception of her employment in 1980 until 1992--after the college told her that the faculty would not be continued in employment unless and until an Hispanic was hired. The college characterizes Taylor's resistance to its directives as "insubordination"; Taylor characterizes her action as "opposition to discriminatory practices." Both agree that the situation was a substantial and motivating factor in her termination. Clearly a jury should decide the issue of causation.

If the college's refusal to continue the employment of Upward Bound faculty in the summer of 1992 until a Hispanic was hired is discrimination per se, then it is clear that the faculty would have had a legal cause of action for discrimination. Why is it not equally clear that Taylor, who opposed the action because it was discrimination per se, and was subsequently discharged for disagreeing with and actively opposing management's directive to discriminate, is also entitled to pursue a legal remedy for the retaliation she

suffered as a result of the injustice to the faculty and her opposition to the College's action?

6. Procedural Due Process. The District Court correctly held that Petitioner was a public employee with a property interest in his or her current and/or continued employment[3] . Therefore, Petitioner had a right to procedural due process prior to and subsequent to termination. Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

The essential requirements of procedural due process are (1) notice and (2) hearing; and the hearing procedures afforded to the employee must be "fair". Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Davis v. West Community Hospital, 755 F.2d 455 (5th Cir. 1985). Petitioner contended that the Defendants not only failed to provide a pre-termination hearing but that the post-termination procedures were inadequate to meet the requirements of due process.

The primary inadequacy cited by Petitioner was the lack of notice of the charges and evidence against her. (Appellant's Brief, pp. 28-32). It was and is Petitioner's position that she received no reprimands, warnings, or other notice of improper conduct between August 20 (when she received the August 10 memo from Jones) and February 11, 1993, when she was told that a decision had been made to terminate her employment. The written document (i.e., Michaelis' letter) furnished on February 11, contained no factual allegations, but merely stated conclusions that she had continued to violate policies and had been

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[3]At the time of her termination, Taylor was working under a written contract of employment that extended through August 31, 1993 (D.C.Op.,p.11-12, R. 1473-1474).

insubordinate. Defendants did not dispute Petitioner's contention that the summary judgment record in this case contains no notice of specific improprieties between August 20, 1992 and February 11, 1993. On page 30 of Appellee's Brief in the Fifth Circui, Defendants contended that Petitioner had adequate notice; but the only evidence cited by Defendants were memos between Jones and Taylor (and others) drafted in the summer of 1992, i.e. a memo from Jones dated June 23, 1992 (R. 532-533) and other correspondence as follows: an undated memo from Jones to Taylor, a memo from Taylor to Jones dated June 29, 1992, a memo from Jones to Taylor dated July 2, 1992, a response from Taylor to Jones, dated July 6, 1992, a memo from Taylor to Staff dated July 6, 1992, a memo from Jones to Conine dated July 1, 1992 (with no copy shown to Petitioner), a memo from Jones to Taylor dated July 9, 1992, a memo from Jones to Taylor dated July 14, 1992, a memo from Taylor to Jones dated July 27, 1992 (R. 535-545). Petitioner's Affidavit stated that her "last warning, reprimand, or notification of any allegation of wrongdoing...was contained in the memo dated August 10...and delivered...on August 20, 1992", that the letter terminating her employment " referenced no specific policies or procedures that authorize the College to terminate my written contract" and that she "asked for specific information about the reasons for the termination", but none were ever furnished to her (R. 849-850; 1214-1215). The conclusory statements made by Mr. Jones in his recommendation to terminate Petitioner's employment appeared to include numerous charges that were not made in his memos in the summer of 1992. It is undisputed that the Jones' February letter recommending Taylor's discharge (R. 246-247) was not furnished to Taylor on February 11, 1993 and was not furnished thereafter when she requested more specific information about the reason for her discharge.

Due process requires that the employee receive "notice and an opportunity to respond". Page v. DeLaune, 837 F.2d 233, 239 (5th Cir. 1988) quoting from Loudermill, 105 S.Ct. at 1495. (See also other cases cited in Page at 239); Hill v. Pontotoc, Mississippi, 993 F.2d 422, 424 (5th Cir. 1993) wherein the plaintiff claimed that notice was not sufficient to meet minimum procedural due process requirements; and Findeisen v. North East Independent School District, 749 F.2d 234 (5th Cir. 1984), wherein the Court emphasized the importance of a pre-termination hearing rather than merely a post-termination remedy.) In Page, the Fifth Circuit reversed a summary judgment granted by the District Court because the employer did not furnish Page adequate notice of her wrongdoing. Specifically, in Page, the plaintiff asserted that she had received no criticism of her work from her supervisors between January of 1982, when she received a memo threatening termination in the event of "a repeat performance", and December, 1982, when she was discharged. In Page, the District Court held that the January memo was sufficient to meet the "notice and opportunity to respond requirement" of procedural due process. The Fifth Circuit, however, held that "effective notice must convey the specific reasons for termination; the January, 1982 memorandum did not do so" (at p. 239). Because the Page defendants failed to meet the minimum notice requirement for procedural due process, the Court reversed and remanded Page's claim for violation of procedural due process.

In the instant case, the Defendants also wholly failed to provide Taylor with adequate notice of the charges against her. As this Court said in Loudermill, "the tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence and an opportunity to present his side of the

story". The District Court in this case, and the Fifth Circuit, erred in holding that the memos from the summer of 1992 (six months prior to Appellant's termination) and the conclusory letter of February 11, 1993 constituted "notice" sufficient to meet the minimum due process requirement; and Taylor's procedural due process claim clearly should be reversed and remanded for trial.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Honorable Court grant Petitioner's Petition for Writ of Certiorari, review the decision of the Fifth Circuit Court of Appeals, rendered on June 26, 1996, reverse the Judgment of the Fifth Circuit Court of Appeals, and remand this case to District Court for trial on the merits.

Respectfully submitted,

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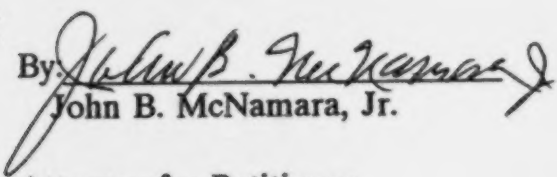
By: 
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